United States Court of Appeals

for the Second Circuit

APPELLANT'S APPENDIX

74-1675

United States Court of Appeals

For the Second Circuit

Docket No. 74-1675

IBERIAN TANKERS COMPANY,

Plaintiff-Appellee,

against

GATES CONSTRUCTION CORP.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S APPENDIX

HILL, RIVKINS, CAREY, LOESBERG & O'BRIEN
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PAGINATION AS IN ORIGINAL COPY

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United States District Court

Southern District of New York

Docket No. 68 Civ. 4495 wk

IBERIAN TANKERS COMPANY,

Plaintiff-Appellee,

against

GATES CONSTRUCTION CORP.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Docket Entries

Date	*Proceedings*
Nov. 14-68	Filed complaint and issued summons.
Dec. 2-68	Filed summons and return. Served Gates Construction Corp. by J. Brennan in Office of Sec. of State in NDNY 11/21/68.
Dec. 5-68	Filed Answer to complaint.
Dec. 12-69	Filed Notice of Examination de bene esse.
Dec. 20-69	Filed Plaintiffs Note of Issue.
Dec. 13-71	Filed platff's. pre trial memorandum.
Jan. 10-73	Filed Deft's. Pre-Trial Order. Knapp, J.
June 5-73	Filed deft's. notice of identity of witnesses re: or of 1-9-73.

Docket Entries

Date	*Proceedings*
June 12-73	Filed Notice that pltf. Iberian Tankers Co. may call the following witnesses at the trial of this action: Captain Robert O. Patterson, Mr. Robert Raguso, and Mr. Anthony Suarez.
June 25-73	Non-Jury Trial begun before Knapp, J.
June 26-73	Trial Contd.
June 27-73	Trial contd. and concluded. Judge's decision 50-50 for liability. Parties to try to settle as to damages and report back to the Court in 2 weeks.
Aug. 3-73	Filed Opinion #39740: By way of summarizing the findings made in open court on 6-27-73, they are as indicated. The parties having agreed that any substantial negligence of pltff. would reduce its claim by 50%, I so find. Knapp, J. Mailed notice.
Dec. 12-73	Filed Judgment #73,982: Order that the pltff. recover of & from the, deft. the sum of $280,000.00 together with interest at six percent, per annum from June 27, 1973 until paid. The court orders that briefs on this issue shall be submitted to the court by the 7th day of January, 1974. So ordered. Knapp, J. Judgment Ent. Clerk. Ent. 12-19-73. m/i
Jan. 23-74	Filed Opinion #40272: It is determined that interest at the rate of 6% should be allowed. The court concludes that pltff. is entitled, to such prejudgment interest. Let judgment be entered accordingly. So ordered. Knapp, J. m/n
Feb. 21-74	Filed deft's. notice of appeal to the USCA from order of Knapp, J. Re: Judgment entered. Mailed copy to Bigham, Englar, Jones & Houston.
Apr. 2-74	Filed Order that deft's. time to transmit the record on appeal to the, court of appeals is ext. from 4-2-74 to 5-22-74. Knapp, J.

Summons

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

68 Civil Action File No. 4495

IBERIAN TANKERS COMPANY,

Plaintiff,

v.

GATES CONSTRUCTION CORP.,

Defendant.

To the above named Defendant:

You are hereby summoned and required to serve upon Bigham, Englar, Jones & Houston plaintiff's attorney, whose address is 99 John Street, New York, N.Y. 10038 an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

JOHN J. O'LASP
Clerk of Court.

S. SWANAP
Deputy Clerk.

Date: November 4, 1968

Complaint

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

68 Civ. In Admiralty

IBERIAN TANKERS COMPANY,

Plaintiff,

against

GATES CONSTRUCTION CORP.,

Defendant.

The complaint of Iberian Tankers Company against Gates Construction Corp., in a cause of stranding, Civil and Maritime, alleges upon information and belief as follows:

FIRST: This is a case of Admiralty and Maritime jurisdiction as hereinafter more fully appears, and is an Admiralty or Maritime claim within the meaning of Rule 9(h).

SECOND: At all times hereinafter mentioned Iberian Tankers Company was and still is a corporation incorporated under and by virtue of the laws of the Republic of Liberia, with an office and principal place of business at International Centre, Suite 402 Bermudian Road, Hamilton, Bermuda, and was and still is the owner and operator of the T/V WAPELLO which up until the occurrences hereinafter set forth was in all respects tight, staunch and seaworthy, and properly manned and equipped.

THIRD: At all times hereinafter mentioned Gates Construction Corp. was and still is a corporation duly incorporated under and by virtue of the laws of the State of New Jersey, and has an office and principal place of busi-

ness within this District and within the jurisdiction of this Honorable Court, and operated and controlled the tugs DAD and NICA THERIOT and the barge M-266.

FOURTH: At about 1130 hours on the morning of December 11, 1967 the tugs DAD and NICA THERIOT, with the barge M-266 in tow, caused and permitted the said barge to come in contact with buoy No. 1 which marks the entrance to Sandy Hook Channel, and thereafter caused and permitted said buoy to be dragged about three miles off station. Thereafter those in charge of said tugs failed to notify the United States Coast Guard or any other agency, individual or corporation that buoy No. 1 had been moved from its proper station.

FIFTH: On the early afternoon of December 11, 1967 the S.S. WAPELLO, with a licensed pilot aboard and with a duly licensed master and officers on the bridge, approached the entrance to Sandy Hook Channel under conditions of reduced visibility and without knowledge that the buoy marking the entrance to said channel had been dragged from its proper station by the tugs DAD and NICA THERIOT and the barge M-266. As a result of the fact that the buoy was not on station the S.S. WAPELLO grounded at the entrance to Sandy Hook Channel and sustained severe damage.

SIXTH: By reason of the premises Iberian Tankers Company has sustained damage in the amount of $600,000 as nearly as the same can now be ascertained, no part of which has been paid although payment has been duly demanded.

WHEREFORE, plaintiff prays that process in due form of law, according to the course and practice of this Honorable Court in causes of Admiralty and Maritime jurisdiction,

issue against Gates Construction Corp. the defendant herein, and that the said defendant be cited to appear and answer all and singular the matters aforesaid; that this Honorable Court be pleased to decree to your plaintiff its damages, with interest and costs, and that your plaintiff may have such other and further relief as in law and justice it may be entitled to receive.

BIGHAM, ENGLAR, JONES & HOUSTON
Attorneys for Plaintiff

By DONALD M. WAESCHE JR.
A Member of the Firm

Office & P.O. Address
99 John Street
New York, N. Y. 10038

Answer

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

68 Civ. 4495

[SAME TITLE]

The defendant, GATES CONSTRUCTION CORP., by its attorneys, HILL, RIVKINS, WARBURTON, MCGOWAN & CAREY, answering the complaint herein, alleges upon information and belief as follows:

FIRST: Admits the allegations contained in paragraph "First" of the complaint.

SECOND: Denies knowledge or information sufficient to form a belief as to the business status and residence as contained in paragraph "Second" of the complaint herein, and denies each and every other allegation contained in paragraph "Second" of the complaint.

THIRD: Admits the allegations of paragraph "Third" of the complaint.

FOURTH: Admits that at about 1130 hours on December 11, 1967, tugs DAD and NIKA THERIOT, towing Barge M-266 came in contact with buoy No. 1 of Sandy Hook Channel and denies each and every other allegation of paragraph "Fourth".

FIFTH: Denies each and every allegation in paragraph "Fifth" of the complaint.

SIXTH: Denies each and every allegation contained in paragraph "Sixth" of the complaint.

Answer

SEVENTH: The defendant insofar as each and every affirmative defense hereinafter set forth repeats and realleges the admissions and denials more particularly set forth in paragraphs numbered First through Sixth hereof as if said admissions and denials were set forth at length preceding each and every affirmative defense of the defendant herein.

FOR A FIRST AFFIRMATIVE DEFENSE

EIGHTH: That the contact with and moving of buoy No. 1 of Sandy Hook Channel by the tugs DAD and NIKA THERIOT and the Barge M-266 resulted from force majure in consequence of heavy weather not foreseeable and the said contact with and moving of buoy No. 1 as aforesaid did not occur as a result of fault on the part of the tugs DAD and NIKA THERIOT and/or Barge M-266.

FOR A SECOND AFFIRMATIVE DEFENSE

NINTH: That during all the times herein pertinent and hereinafter applicable, the T/V WAPELLO was operated and controlled by an incompetent pilot, master and crew.

FOR A THIRD AFFIRMATIVE DEFENSE

TENTH: That those in charge of the T/V WAPELLO were careless, inattentive and negligent to their duties in the handling and navigation of the said vessel.

FOR A FOURTH AFFIRMATIVE DEFENSE

ELEVENTH: That the T/V WAPELLO and those in her charge failed to maintain a good, proper and efficient lookout.

Answer

For a Fifth Affirmative Defense

Twelfth: That the T/V WAPELLO and those in her charge failed to take into account winds and tides.

For a Sixth Affirmative Defense

Thirteenth: That the T/V WAPELLO and those in her charge failed to take any or timely steps to avoid running aground.

For a Seventh Affirmative Defense

Fourteenth: That the T/V WAPELLO and those in her charge failed to go at a moderate speed or to slow down under conditions of restricted visibility.

For an Eighth Affirmative Defense

Fifteenth: That the T/V WAPELLO and those in her charge failed to keep on the proper side of Sandy Hook Channel.

For a Ninth Affirmative Defense

Sixteenth: That the T/V WAPELLO and those in her charge failed to take advantage of those navigation aides available.

For a Tenth Affirmative Defense

Seventeenth: That the T/V WAPELLO and those in her charge failed to take into account the special circum-

stances existing prior to grounding which required special navigational duties by those in charge of the T/V WAPELLO.

For an Eleventh Affirmative Defense

Eighteenth: That the T/V WAPELLO grounded solely as a result of the negligence of those in charge of the said T/V WAPELLO and the absence of buoy No. 1 of Sandy Hook Channel did not contribute to or cause the stranding of the said T/V WAPELLO.

Wherefore, defendant demands judgment dismissing the complaint with disbursements and costs.

Hill, Rivkins, Warburton, McGowan & Carey
Attorneys for Defendant

By: J. Edwin Carey
A Member of the Firm

96 Fulton Street
New York, New York 10038
233-6171

Pre-Trial Order

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

68 Civ. 4495

[SAME TITLE]

The parties to this action, through their attorneys, have appeared before the Court at a pre-trial conference pursuant to local Rules 6 and 13 and Rule 16 of the Federal Rules of Civil Procedure. The following actions were taken:

1. The pleadings were agreed to be deemed to be amended in accordance with the framing of the issues in this action in Paragraph "10" of this pre-trial order.

2. The parties agree that the trial of this action should be based upon this order and upon the pleadings as amended, except that the following issues raised by the pleadings are expressly abandoned:

None

3(a). The parties stipulated that the following facts are not in dispute in this action, each party reserving the right to object to the materiality of any such stipulated fact and its relevancy to the issues.

(1) Iberian Tankers Company is a corporation incorporated under and by virtue of the laws of the Republic of Liberia, with an office and principal place of business at Hamilton, Bermuda, and on December 11, 1967, was the owner and operator of the T/V WAPELLO.

(2) Gates Construction Corp. is a corporation duly incorporated under the laws of the State of New Jersey and

on December 11, 1967, operated and controlled the tugs, DAD and NICA THERIOT, and the Barge M-266.

(3) The T/V WAPELLO is a Panamanian flag tanker, 760′1½″ in length, 104′ in beam, with a single screw. She is turbine propelled and her main engine generates 13,500 shaft horsepower. Her draft on the early afternoon of December 11, 1967, was 33′7″ forward and 34′ aft. The T/V WAPELLO was equipped with gyro and magnetic compasses, two radar sets, a fathometer, and VHF radio.

(4) The tug, NICA THERIOT, is 90′4″ in length, 24′ in beam, diesel propelled, of 2400 hp. and is twin-screwed. On December 11, 1967, the tug was equipped with five radios, a radar, gyro and magnetic compasses, a fathometer, and had on board proper charts of the area encompassing Sandy Hook Channel.

(5) The tug, DAD, is 75′ in length, 22′ in beam, diesel propelled, of 1200 hp. and is twin-screwed. On December 11, 1967, the tug was equipped with radios and magnetic compass and a radar.

(6) The Barge M-266 is 270′ long and 70′ in beam. The barge is equipped with four winches, each with two drums which are used to raise and lower her anchors. The machinery which operates the winches is controlled from an enclosed housing erected on the deck of the barge.

(7) At approximately 11:51 A.M. on the morning of December 11, 1967, the T/V WAPELLO, having on board a cargo of approximately 40,000 long tons fuel oil, and with a draft of 33′7″ forward and 34′ aft, weighed anchor and proceeded from the Tompkinsville Anchorage off Staten Island, bound for the Hess Terminal at Port Reading in the Arthur Kill via Ambrose and Sandy Hook Channels, having previously taken on board a federally licensed harbor pilot.

(8) At approximately 1:28 P.M. on December 11, 1967, the T/V WAPELLO stranded while on a heading of 290° in the area of Sandy Hook Channel at a position identified on a chart which will be produced at the trial.

(9) At approximately 9:00 A.M. on the morning of December 11, 1967, the tugs, NICA THERIOT and DAD, commenced towing the Barge M-266 from a position off Rockaway Beach with the intention of anchoring the barge in the lee of Sandy Hook.

(10) At approximately 12:55 P.M. on December 11, 1967 (some 33 minutes prior to the time when the T/V WAPELLO stranded) the port side of the Barge M-266 struck Sandy Hook Channel Entrance Buoy No. 1. The said Buoy No. 1 was dragged by the tugs and barge to a point approximately between Buoys 12 and 13 of Sandy Hook Channel and the said buoy thereupon became disengaged.

4(a). Plaintiff, Iberian Tankers Company, contends:

(1) Gates Construction Corp., as operator of the tugs, DAD and NICA THERIOT, and the Barge M-266, negligently caused and allowed Sandy Hook Channel Entrance Buoy No. 1 to be dragged off station, and that as a direct, proximate cause of this negligent act the T/V WAPELLO grounded.

This Court has on two prior occasions held that the United States, through its agency, the United States Coast Guard, was negligent in causing or permitting a navigational buoy to be off station, thereby causing a vessel to ground. In *Afran Transport Co.* v. *U.S.*, 309 F. Supp. 650 (SDNY 1969), affirmed 435 F. 2d 213 [CA 2d 1970], the United States was held solely at fault for permitting a buoy marking a ledge to be 400 yards off station. In *Richmond Marine Panama S.A.* v. *United States, et al.*, 67 Civ. 5012,

Judge Gurfein, in a decision issued October 25, 1972, as yet not reported, held the United States fifty percent at fault for allowing a channel buoy to be off station, thereby contributing to the stranding of plaintiff's vessel, and allowed plaintiff to recover fifty percent of its provable damages. See, also, *Indian Towing Co.* v. *U.S.*, 350 U.S. 61. If the United States Government can be held at fault for failing to maintain a buoy on station, Gates Construction Corp. can be held at fault for negligently dragging the buoy off station.

14 U.S.C. § 84 provides:

> "It shall be unlawful for any person, or public body, or instrumentality, excluding the armed forces, to remove, change the location of, obstruct, wilfully damage, make fast to, or interfere with any aid to navigation established, installed, operated, or maintained by the Coast Guard pursuant to section 81 of this title * * *."

Violation of this Act constitutes negligence per se.

Furthermore, Coast Guard Regulation 84.10 provides that the length of towing hawsers in inland waters shall be limited to no more than 450 feet, measured from the stern of one vessel to the bow of the other, and that the distance should in all cases be much shorter if weather and sea conditions permit. The Regulation further contains a provision which states:

> "that where, in the opinion of the master of the towing vessel, it is dangerous or inadvisable whether on account of the state of the weather or sea or otherwise, to shorten the distance between vessels, the hawsers need not be shortened to the prescribed length when entering from sea."

We submit that regardless of this provision the tugs, DAD and NICA THERIOT, were in violation of the Regulation when they caused and permitted the Barge M-266 to be towed on a hawser 1800 feet in length.

The violation of this Regulation, plus the violation of 14 U.S.C. § 84, calls for the application of *The Rule of The Pennsylvania,* i.e.—that one who breaches a statute or regulation has the duty of establishing not only that his negligent conduct did not but could not have been a cause of the resulting loss.

Plaintiff, Iberian Tankers Company, contends that Gates Construction Corp. is solely at fault. However, in the event the Court holds that both faults on the part of the plaintiff and defendant caused and contributed to the grounding and resulting damages, then under the Admiralty Rule of Divided Damages plaintiff is entitled to recovery fifty percent of its loss. See *Richmond Marine Panama S.A.* v. *United States, supra.*

4(b). Defendant, Gates Construction Corp., contends:

1. Iberian Tankers Company, as owner and operator of the T/V WAPELLO and/or those responsible for her navigation and safety, negligently caused the T/V WAPELLO to strand, which negligence, among other things, consisted of:

(i) Navigation of the vessel at a high rate of speed under limited conditions of visability and in rough seas;

(ii) Violation of Rule 16 of the International Rules of the Road and of Article 16 of the Inland Waters in that the T/V WAPELLO was proceeding at an immoderate rate of speed in reduced visability;

(iii) Failure to use radar properly;

(iv) Failure to accurately ascertain the position and route of the T/V WAPELLO;

(v) Failure to be aware of shoal water conditions in the area;

(vi) Failure to maneuver under acceptable seamanlike standards; and

(vii) Failure to take steps to stop the vessel to ascertain her true position when such position was unknown.

2. The acts of negligence of Iberian Tankers Company and/or its agents, servants and employees were the proximate cause of the stranding of the T/V WAPELLO.

3. The acts of Gates Construction Corp. in dragging Sandy Hook Channel Buoy No. 1 off station were not a contributing cause to the stranding of the T/V WAPELLO.

4. The tugs, NICA THERIOT and DAD, having in tow the Barge M-266, were properly navigated under the existing conditions and the disengaging of Buoy No. 1 by Barge M-266 was caused by conditions of weather, wind and sea beyond the control of Gates Construction Corp. and was not the result of fault on the part of Gates Construction Corp.

5. In any event, the negligent acts of Iberian Tankers Company, their agents, servants and employees consitituted the proximate cause of the stranding of the T/V WAPELLO and there is no basis in law or fact for the application of the Rule of Divided Damages.

5(a). Plaintiff, Iberian Tankers Company, expects to offer the following exhibits:

1. Deck log, T/V WAPELLO.
2. Engine room log, T/V WAPELLO.
3. Deck bell book T/V WAPELLO.
4. Engine room bell book, T/V WAPELLO.

5. Chart in use at the time of the stranding.

6. Sea trial data, T/V WAPELLO.

7. Admiralty Notices to Mariners for week ending December 16, 1967.

8. Copy of message received by the United States Coast Guard from Gates Construction Corp. relative to tugs, DAD and NICA THERIOT, dragging Buoy No. 1 off station.

9. Deposition of Roy Kiffe, master of tug, DAD, and exhibits marked for identification during that deposition.

10. Deposition of Jimmy Terrebonne, master of tug, NICA THERIOT, and exhibits marked for identification during that deposition.

11. Deposition of Edless Rousse, and exhibits marked for identification during that deposition.

12. Course recorder tape, T/V WAPELLO.

5(b). Defendant, Gates Construction Corp., intends to offer the following exhibits:

1. Those exhibits set forth under Paragraph "5(a)" hereof, as well as any other exhibits not specifically identified in Paragraph "5(a)" hereof but which were marked for identification during the several depositions taken herein.

Should any party hereinafter offer additional exhibits prompt notice of that fact shall be given to each other party and to the Court by serving and filing a supplemental pre-trial memorandum. Supplemental pre-trial memorandum may be in a short form statement filed with the Deputy Clerk of Calendars unless served at trial when it is to be

filed with the Trial Judge. It shall set forth the reasons why the exhibit was not theretofore identified. No exhibit may be offered at trial unless identified by a pre-trial memorandum.

5(c). Each party is directed, upon reasonable demand from any other party, to produce for inspection and copying any documents or other exhibits identified in that party's pre-trial memorandum. The authenticity of any such document and exhibit need not be proven at the trial unless a party who or shall propose to question the authenticity of any such document or other exhibit shall have first examined same and within ninety days from the date of this order shall have served upon each of the parties and filed in Court a statement of those exhibits, the authenticity of which will be required to be proven at the trial. If the refusal to concede authenticity shall be found by the Trial Judge to have been unreasonable, the Court may assess the cost of proving authenticity, including reasonable attorneys' fees, upon the refusing party.

6(a). Plaintiff, Iberian Tankers Company, intends to call the following witnesses:

1. Arthur Simonsen, pilot of T/V WAPELLO.
2. Karl Lichi, master of T/V WAPELLO.
3. Expert witness on navigation.
4. Expert witness on radar.
5. Representative United States Coast Guard aids to navigation section.

(b) Defendant, Gates Construction Corp., may call the following witnesses:

1. J. A. Terrebonne, master of the tug, NICA THERIOT.

2. Edless Rousse, Work and Maintenance Superintendent of Gates Construction Corp.

3. R. J. Kiffe, master of the tug, DAD.

4. Expert witness on navigation and radar.

5. Expert witness on meteorology and oceanography.

Should any party hereafter decide to call any additional witnesses, prompt notice of their identity shall be given to each other party and to the Court by serving and filing a supplemental pre-trial memorandum. The supplemental pre-trial memorandum shall be in a short form statement filed with the Deputy Clerk of Calendars unless served at trial when it is to be filed with the Trial Judge. It shall set forth the reason why the witness was not theretofore identified. No witness may be called at trial unless identified in a pre-trial memorandum.

7. The parties agree to limit the number of expert witnesses as follows:

Not limited.

8. The following are all of the claims for damage and other relief asserted by the parties to this action as of the date of this occurrence:

1. Plaintiff claims damage, inclusive of cost of repairs, salvage charges and demurrage, in the aggregate amount of $766,696.10, together with interest and costs.

9. The parties also agree on the following matters:

1. The trial of this action is to establish only the issue of liability, reserving the issue of damages for further hearings.

2. Plaintiff expects to require two trial days.

3. Defendant expects to require two trial days.

10. The issues to be tried, as formulated by the Court with the consent and agreement of the parties, are as follows:

(a) Was the grounding proximately caused by fault and negligence on the part of Iberian Tankers Company and/or its agents, servants and/or employees?

(b) Was Gates Construction Corp. negligent?

(c) In the event the Court determines that both plaintiff and defendant were negligent, is plaintiff, Iberian Tankers Company, entitled to any recovery?

Dated: New York, N. Y.
January 9, 1973.

WHITMAN KNAPP
U.S.D.J.

We hereby consent to the entry of the foregoing Order without further notice.

BIGHAM, ENGLAR, JONES & HOUSTON
Attorneys for Plaintiff

HILL, RIVKINS, WARBURTON, McGOWAN & CAREY
Attorneys for Defendant

Transcript of Court's Colloquy

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

68 Civ. 4495

—o—

IBERIAN TANKERS CO.

vs.

GATES CONSTRUCTION CORP.

—o—

The Court: Perhaps to no one's great surprise, I more or less adhere to my tentative conclusions.

For the sake of the record, I must say it seems to me a closer question of whether plaintiff has borne the burden of proving that the flotilla was negligent. However, it does seem to me that the plaintiff has just about borne that burden.

In the first place, as Captain Patterson's testimony made clear, it was obvious that they were going to have to sail with long lines. They can't be faulted for that. It was obvious they were going to have to do that. It's equally obvious that that was a dangerous procedure, with particular danger to the buoys along the way.

In those circumstances it seems to me it was incumbent on the captain and crew of the flotilla to carefully investigate alternative ways of proceeding and whether it was necessary to pass in this area with its obvious danger to the buoy.

Now, it seems quite clear that they made no such investigation and therefore, if they had made such an investigation and concluded after making such an investigation, all

things being considered, the course that they adopted was the safest, then I might be inclined to rule Captain Patterson's opposite conclusion would come under the general description of Mr. Waesche's quotation.

What was the name?

Mr. Waesche: Captain Knott, your Honor.

The Court: Captain Knott. However, I may quickly say that Captain Patterson seems to be the opposite of Captain Knott. However, he did give that opinion, and although he is not a tugboat expert, he does not impress me as a man who goes around giving opinions that are invalid. He has had enough experience at the sea and his description of his familiarity with tugboat problems led me to believe his views were persuasive in light of the fact it seems quite clear from the depositions that no serious inquiry had been made as to whether this was the safest route.

One of the witnesses, in an altogether unclear answer, testified that it was his opinion that Rockaway — the captain of the smaller tug; I don't know whether it was smaller or not, but the second in command tug — testified, as I said, in an altogether unclear answer, that it was his opinion that the Rockaway refuge would have been safer. He fudged it up later on. But it's quite apparent that no careful investigation of the possibilities was made.

Also the captain of the lead tug testified they hadn't even made any inquiry as to what the weather prognosis was, although they were moving the barge for the purpose protecting it from the increasing weather. Therefore, they were on notice that they were dealing with a dangerous situation.

So those things seem to me to support a conclusion that the tug or the flotilla must bear some responsibility for the moving of the buoy.

Now, on the cases that you cite, still addressing myself to defendant, on the cases you cite with respect to condition and not cause, they all seem to me to deal with situations where the Court found that the injured tug or the plaintiff

had ample opportunity to find out about the condition and failed to avail itself of that opportunity. For example, in the Perseverance case, page 18, it appears the tug was amply advised in advance of the ship's position, and in the Chemical Transporter, Inc., on page 19, the condition was evident early enough for the second to escape injury, and that it is not the situation we had here. There was no way for the captain of the Wapello to have known in advance he was going to be faced with this condition.

I don't, incidentally, find that the plaintiff has borne the burden of proving that there was any neglect in notifying the Coast Guard, because there is no evidence that notification of the Coast Guard would have done any good. I don't think Captain Patterson's offhand opinion that they do it right away establishes they would have had it out in time to do this tug any good. So I think it's immaterial whether you believe the deposition it was notified in five or ten minutes.

Now, turning to the contributory negligence, I don't reject all the other contentions that the defendants have made about the things that the plaintiff tanker should have done. I just don't pass on them, because I don't feel I have to.

I will say that I think Captain Cushman undoubtedly is an excellent seaman, but as a witness he is a little too ready for his conclusions to be altogether persuasive. He had a certain resemblance to Captain Knott described in the opinion which Mr. Waesche quoted. Captain Patterson, on the contrary, gave me quite an opposite impression.

Now, my line of thinking, which I might as well disclose to you, it just seemed to me from the testimony of the Master of the ship that his reasons for the speed he was going, as I sat listening to him, knowing nothing about the subject matter, as he testified, it seemed to me that the reasons he gave for his speed sounded defensive. I remember asking him why he didn't slow it down and he said—I don't remember his exact words—the substance of

what he said was that the ship wouldn't be manageable at a lower speed. So knowing nothing about the subject matter, I had to accept that at that point.

However, after Captain Patterson had gotten off the stand I wondered why, if that were the fact, why Mr. Waesche hadn't asked Captain Patterson. If it was a fact that the vessel was unmanageable at that speed that would have ended the discussion. Therefore, as you remember, I subsequently recalled Captain Patterson, with the results I have discussed. As I said at the outset, I accepted Captain Patterson's testimony pretty much in its entirely.

So the combination of what appears to me now to be false explanation by the Master of the ship for the speed plus the impression I got from Captain Patterson from what his belief was plus my own reaction to the Master's testimony in that regard leads me to conclude that the ship was negligent in proceeding at that speed under those circumstances, and in the light of the description, especially by the Master, Captain Liche, his description of the events on the wheelhouse during the time when they first sighted this "unidentified buoy" until they ran aground, it seemed to me quite clear that had the ship been proceeding at a safe speed the danger could have been avoided. That doesn't mean the absence of the buoy was not a competent producing cause, because I see no reason to believe that had the buoy been there, where it belonged, the ship's speed would have created the accident.

So my conclusions are that the removal of the buoy must be charged to the flotilla, that that was a competent producing cause of the accident, but that the plaintiff's negligence reduces the defendant's liability by 50 per cent.

Mr. Waesche: 50 per cent?

The Court 50 per cent.

Anybody else have anything?

Thank you, gentlemen.

(Discussion off the record.)

Opinion of Whitman Knapp, *U.S.D.J.*
as to Liability

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

68 Civ. 4495

[SAME TITLE]

Appearances:

BIGHAM, ENGLAR, JONES & HOUSTON, Attorneys for Plaintiff, 99 John Street, New York, New York 10038, DONALD M. WAESCHE, JR., of Counsel.

HILL, RIVKINS, MCGOWAN & CAREY, Attorneys for Defendant, 96 Fulton Street, New York, New York 10038, J. EDWIN CAREY, RAYMOND P. HAYDEN, of Counsel.

KNAPP, *J.*

By way of summarizing the findings made in open court on June 27, they are as follows:

1. I find that the removal of the buoy was caused by defendant's negligence, the finding of such negligence being based on the conceded fact that defendant's servants gave no thought to exploring the possibility of alternative routes which would have avoided exposing the buoy to danger.

2. I find that the absence of the buoy was a contributing cause of the accident. This finding is based on the testimony of the master and the pilot which, for the most part I accept.

3. I find that the plaintiff's negligence contributed to the accident. In this connection, defendant advanced several theories upon which plaintiff's negligence could be

predicated. I pass on only one of such theories. I find that plaintiff's tanker was proceeding at an excessive speed in the circumstances then prevailing. I base this finding on my reaction to the master's testimony on the subject of speed and plaintiff's expert Mr. Patterson on that same subject. Among other things, the master claimed that any substantial reduction in speed would have rendered his ship unmanageable. Mr. Patterson, whose testimony I found to be wholly credible, flatly rejected that claim.

4. The parties having agreed that any substantial negligence of plaintiff would reduce its claim by 50%, I so find.

Dated: NewYork, New York
August 2, 1973.

WHITMAN KNAPP, U.S.D.J.

**Opinion and Order of Whitman Knapp, *U.S.D.J.*
as to Prejudgment Interest
Appealed From**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

68 Civ. 4495

[SAME TITLE]

Appearances:

BIGHAM, ENGLAR, JONES & HOUSTON, Attorneys for Plaintiff, 99 John Street, New York, New York 10038, DONALD M. WAESCHE, JR., of Counsel.

HILL, RIVKINS, McGOWAN & CAREY, Attorneys for Defendant, 96 Fulton Street, New York, New York 10038, J. EDWIN CAREY, RAYMOND P. HAYDEN, of Counsel.

KNAPP, *J.*

This case was tried in admiralty to the Court and resulted, on June 27, 1973, in a finding that plaintiff's claim against defendant for injury to its vessel be reduced 50% by reason of plaintiff's substantial negligence. The parties then stipulated that plaintiff's damages should be fixed at $280,000.00 (one-half the total suffered by its ship). Defendant has paid this sum with interest from the date of the Court's finding of liability. The sole question remaining is whether plaintiff is entitled to prejudgment interest to run (a) on the portion of the agreed sum attributable to the repair of its vessel, from the dates payments for repairs were made, and (b) on the remainder of the sum, from the dates losses of profits were incurred.

The Court concludes that plaintiff is entitled to such prejudgment interest. However, as the question does not

seem free of doubt, the Court will set forth its reasoning in some detail so that adequate appellate relief can be assured.

Prejudgment interest in admiralty is said to rest in the Court's discretion, but that this is a "legal" discretion to be exercised according to certain rules. *The Wright* (2nd Cir. 1940), 109 F. 2d 699, 702. This qualification is important, because having found that plaintiff's negligence was more clearly established than defendant's (compare stenographer minutes HP 1 with HP 6) [Appendix supra pp. 21a-24a] we should—if our discretion were controlled only by our innate sense of the fitness of things—be inclined to deny plaintiff's claim for interest in order to "ameliorate somewhat the harsh American rule that division of damages must be equal without reference to the degree of fault." See *Afran Transport Co.* v. *The Bergechief* (2nd Cir. 1960), 285 F. 2d 119. However, we do not so construe our powers.

As we understand the teaching of *The Wright*, prejudgment interest should be awarded in admiralty cases absent a showing of "exceptional circumstances to justify the refusal" (109 F. 2d at 702). As far as we can determine, only two categories of situations have been recognized as "exceptional" for this purpose: (a) where a plaintiff has inordinately delayed the prosecution of its claim; and (b) in mutual fault collision cases where it was uncertain until judgment which party would be called upon to make a payment.

Neither situation is here present. There is no claim—nor could there reasonably be—that plaintiff was in any way responsible for the delay in bringing this 1968 action to trial. As to the second category, while this was a "mutual fault" case, it did not involve a "collision" which —in our view—is the aspect of the situation that triggers the right to deny prejudgment interest. It is only in the case of a collision where both parties suffer damage and

where, accordingly, there can be uncertainty as to which party will be called upon to pay. Here defendant suffered no damage and there was, accordingly, no possibility that plaintiff would be called upon to pay anything. The only uncertainty was whether and how much plaintiff could recover from defendant. Such uncertainty exists in every litigation, and cannot be classified as a special circumstance. See *Carriers of Liberia, Inc.* v. *Navigen Co.* (S.D.N.Y. 1969), 305 F. Supp. 895, aff'd 435 2d 549.

In the case cited, Judge Metzner, adopting language from an opinion of the Delaware District Court, observed (at 897):

> "'Where only one libel is filed the only uncertainties are those accompanying every admiralty action and every action sounding in tort, viz., the uncertainty of proving liability and the amount of damages. In such cases there is no uncertainty as to the party who should pay all or a portion of the damages if liability can be proven. If interest could not be allowed until the damages are liquidated and the responsibility fixed, it is difficult to see in what admiralty cases of collision interest could ever be discretionary or allowed from a date preceding the decree fixing liability, and the general rule regarding interest in admiralty proceedings would have no force.'"

See also: *The President Madison* (9th Cir. 1937) 91 F. 2d 835 and cases cited at 846-7; *Mid-America Transportation Co., Inc.* v. *Rose Barge Line, Inc.* (8th Cir. 1973) 477 F. 2d 914; *Elgin, Joliet & Eastern Railway Co.* v. *American Commercial Line, Inc.* (N.D. Ill. 1970) 317 F. Supp. 175; *Mobil Oil Corp.* v. *Tug Pensacola* (5th Civ. 1973) 472 F. 2d 1175; *American Zinc Co.* v. *Foster* (5th Civ. 1971) 441

F. 2d 1100; *Esso International, Inc.* v. *SS Captain John* (5th Civ. 1971) 443 F. 2d 1144; *Sinclair Refining Co.* v. *SS Green Island* (5th Civ. 1970) 426 F. 2d 260; *Moore-McCormack Lines, Inc.* v. *Amirault* (1st Civ. 1953) 202 F. 2d 893; *Frost* v. *Gallup* (D. Rhode Is. 1971) 329 F. Supp. 310; *Algonquin Deep Sea Research Corp.* v. *Perini Corp.* (D. Mass. 1973) 353 F. Supp. 561; *The Manitoba* (1886) 122 U.S. 97; *United States* v. *Eastport Steamship Corp.* (S.D.N.Y. 1964) 232 F. Supp. 137.

Having ruled that we believe the law to be as above set forth, we shall simply note certain dicta which might be deemed to support a contrary view In *Afran Transport, supra,* the Second Circuit observed that "Normally the award of interest may await the Court's judgment which finds the amount due" (285 F. 2d at 120). However, that observation occurred in a rather cryptic per curiam affirmation of a denial of interest in a collision case, and we do not believe it was intended to modify the *Wright* doctrine, which the Court had just cited as authoritative.

In *Lady Nelson, Ltd.* v. *Creole Petroleum Corporation* (2nd Cir. 1961) 286 F. 2d 684, the appellant challenged the "allowance of interest prior to the decree" (at 698). In affirming, the Court of Appeals ruled that the District Court had properly exercised its discretion in allowing interest "from the date the amount of damages was determined" (Id). Although it could be argued that the court was intending by means of a negative pregnant to foreclose the award of interest *prior to* the determination, no such question was before the Court, and we do not so construe the opinion.

We note that it might also be argued that Judge Bonsal has taken a different view of the decisions just discussed. In *Triangle Cement Corp.* v. *Towboat Cincinnati* (1967) 280 F. Supp. 73, aff'd 393 F. 2d 936, he cited those two decisions for the proposition that it was "the usual rule

that interest begins to run from the date of the final decree" (at 77). See also *Maryland Shipbuilding & Drydock Co.* v. *Patapsco Scrap Corp.* (D. Md. 1959) 169 F. Supp. 605, aff'd 268 F. 2d 817.

In conclusion, it is determined that interest at the rate of 6% should be allowed as follows:

a. with respect to the damages attributable to repairs, from the dates repair payments were made by plaintiff;

b. with respect to the damages attributable to the loss of profits, from the dates such losses occurred. Absent a better criterion, the parties might agree to the running of interest from September 1, 1970, the approximate median date between the accident and June 27, 1973. Cf. NY CPLR § 5001(b).

Hopefully, the parties—without waiver of any right to challenge the foregoing formula—can stipulate as to the results of its application.

Let judgment be entered accordingly.

So Ordered.

Dated: New York, New York
January 22, 1974.

Whitman Knapp, *U.S.D.J.*

Judgment on Liability

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

68 Civ. 4495 W.K.

[SAME TITLE]

The above entitled cause having come on to be heard on the pleadings and proof adduced by the respective parties, and having been argued and submitted by the attorneys for the respective parties, and due deliberation having been had and the Court having handed down its written opinion that both the plaintiff and defendant are equally at fault for the stranding of the T/V WAPELLO and resulting damage and loss,

Now, upon the subjoined consent and on motion of BIGHAM, ENGLAR, JONES & HOUSTON, attorneys for the plaintiff herein it is

ORDERED that the opinion of the Court heretofore filed herein on the 3rd day of August, 1973 be and hereby is adopted as the Court's findings of fact and conclusions of law, and it is further

ORDERED, ADJUDGED AND DECREED that the plaintiff herein recover of and from the defendant the sum of Two Hundred Eighty Thousand Dollars ($280,000.00), together with interest thereon at six percent (6%) per annum from June 27, 1973 until paid, said sum representing fifty percent of the provable damages sustained by the plaintiff herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that each party shall bear its own costs.

Judgment on Liability

The question of whether plaintiff is entitled to prejudgment interest is still at issue and has not been resolved by this Court. The Court orders that briefs on this issue shall be submitted to the Court by the 7th day of January, 1974.

Dated: New York, N.Y.
December 10, 1973

So Ordered:

Whitman Knapp,
U.S.D.J.

We hereby consent to the entry of the above Judgment without further notice.

Hill, Rivkins, McGowan & Carey
Attorneys for Defendant
96 Fulton Street
New York, N.Y. 10038

Judgment Entered December 18, 1973

Raymond F. Burghardt
Clerk

Notice of Appeal

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

68 Civ. 4495

[SAME TITLE]

NOTICE IS HEREBY GIVEN that Gates Construction Corp., defendant above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the Order of the Honorable Whitman Knapp, U.S.D.J., directing that a Judgment be entered granting plaintiff pre-judgment interest at the rate of six percent (6%) per annum as follows:

(a) with respect to damages attributable to repairs from the dates repair payments were made by plaintiff; and

(b) with respect to damages attributable to loss of profits from the dates such loss occurred; the Court suggesting as a criteria interest from September 1, 1970 to June 27, 1973, said Order in this action being dated January 22, 1974.

Dated: New York, New York
February 21, 1974

Yours, etc.,

HILL, RIVKINS, CAREY, LOESBERG & O'BRIEN
Attorneys for Defendant
Office & P.O. Address
96 Fulton Street
New York, New York 10038
233-6171

Notice of Appeal

To:

Clerk of the Court
United States District Court
Southern District of New York
United States Court House
Foley Square
New York, New York 10007

Bigham, Englar, Jones & Houston
Attorneys for Plaintiff
99 John Street
New York, New York 10038

Service of three ~~(3)~~ 1 copies of the within
is admitted this 11 day of June 19 74

Brigham Englestead H Houston